TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 268.

GEORGE H. MIFFLIN, JAMES MURRAY KAY, HENRY O. HOUGHTON, INDIVIDUALLY AND AS TRUSTEE WITH ALBERTA M. HOUGHTON UNDER THE WILL OF HENRY O. HOUGHTON, DECEASED, ET AL., &c., APPELLANTS,

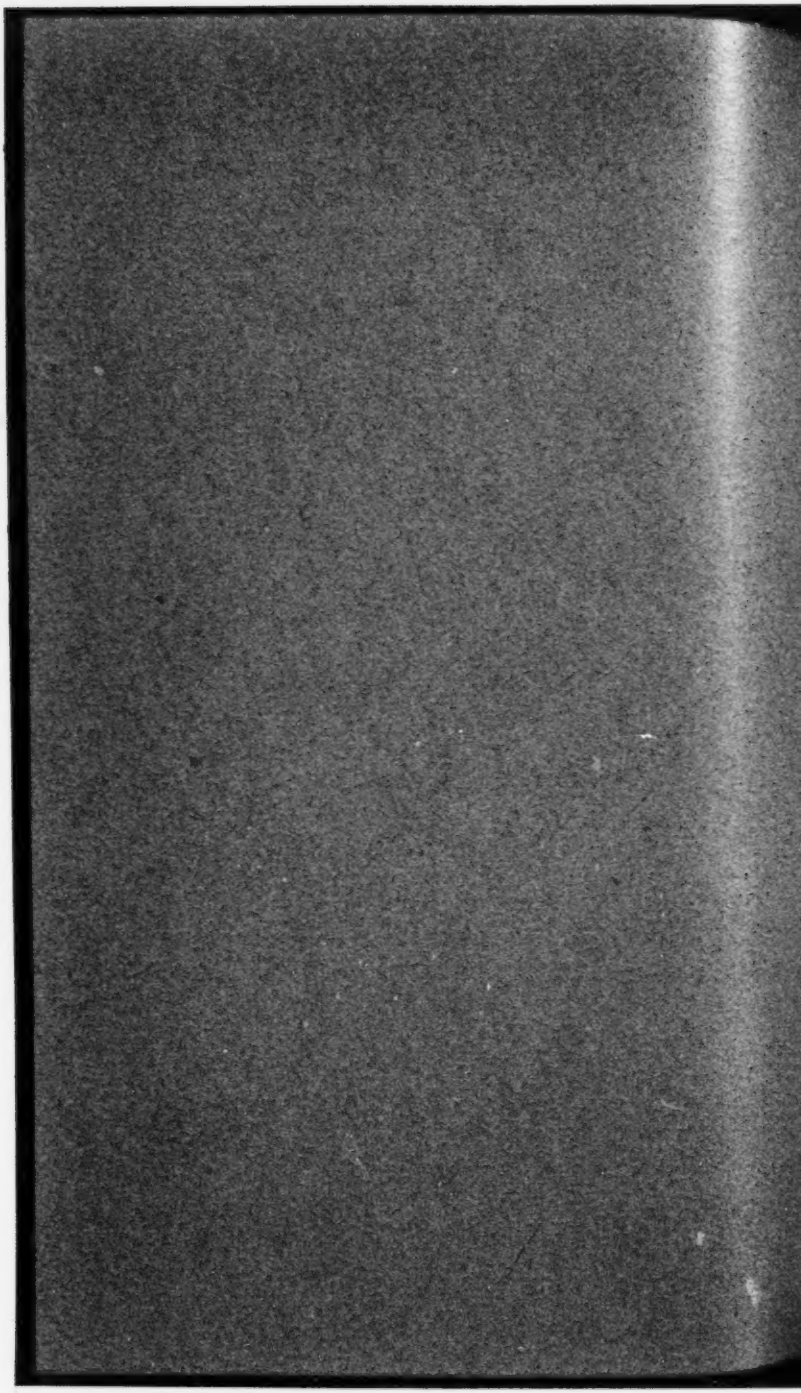
vs.

THE R. H. WHITE COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED MARCH 7, 1902.

(18,442.)



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a United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
R. H. WHITE COMPANY, Defendant, Appellee. } No. 388.

Appeal from the circuit court of the United States for the district of Massachusetts from final decree (Colt, J.), March 29, 1901.

Transcript of record upon the appeal of George H. Mifflin *et al.*, complainants, appellants, in the above-entitled cause, to the Supreme Court of the United States.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
R. H. WHITE COMPANY, Defendant, Appellee. } No. 388.

Transcript of Record of Circuit Court.

(Filed in circuit court of appeals May 31, 1901.)

UNITED STATES OF AMERICA,
District of Massachusetts, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand nine hundred.

Before the Honorable Le Baron B. Colt, circuit judge.

GEORGE H. MIFFLIN ET AL., Complainants,
v.
R. H. WHITE COMPANY, Defendant. } No. 1232. Equity.

The original bill of complaint in this cause was filed in the clerk's office on the seventh day of December, A. D. 1899, and was duly entered at the October term of this court, A. D. 1899.

2 On the thirteenth day of March, A. D. 1900, an amended bill of complaint was filed and allowed by consent and is in the words and figures following :—

3 Circuit Court of the United States, District of Massachusetts.
In Equity.

GEORGE H. MIFFLIN ET AL.
v.
R. H. WHITE COMPANY. } No. 1232.

Amended Bill of Complaint.

(Filed and allowed by consent March 13, 1900.)

To the honorable the judges of the circuit court of the United States in and for the district of Massachusetts, sitting in equity:

George H. Mifflin, of Boston, James Murray Kay, of Brookline, Henry O. Houghton, individually and as trustee with Alberta M. Houghton, both of Cambridge, under the will of Henry O. Houghton, deceased, all within the district of this court, and Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, all of New York in the State of New York, and all citizens of the United States, copartners under the firm name of Houghton, Mifflin & Company, and having a usual place of business in said Boston, bring this, their amended bill of complaint, against the R. H. White Company, a corporation duly established according to law, and having its usual place of business in Boston within said district.

And your orators show unto your honors, upon information and belief, that Oliver Wendell Holmes, late of said Boston, was at all the times hereinafter mentioned until his death, which occurred on the seventh day of October, 1894, a citizen of the United States, and was the author of a certain literary work entitled "The Professor at the Breakfast Table," and that during the year 1858 the firm of Phillips, Sampson & Company was engaged in the publish-
4 ing business in the city of Boston and State of Massachusetts, and was the proprietor and publisher of a certain periodical magazine published each month at the said city of Boston and entitled and known as the "Atlantic Monthly," and having a large circulation; and that thereafter said firm continued to be the proprietor and publisher of said magazine until the sale and assignment thereof to the firm of Ticknor & Fields in the fall of the year 1859, as hereinafter stated.

And your orators further say that said literary work entitled "The Professor at the Breakfast Table" consisted of twelve component parts, and that ten of said parts of said work were published in print, under the title "The Professor at the Breakfast Table," in and as a part of ten numbers of the said "Atlantic Monthly," to wit, those for January, 1859, and each successive month thereafter, down to and including the month of October, 1859, by the said firm of Phillips, Sampson & Company, at the said city of Boston, prior to the twenty-eighth day of September, 1859; and that the two other parts of said work, the same with said ten parts constituting the whole of said work, were published in print, under the title "The Professor at the Breakfast Table," in and as a part of the numbers

of the said "Atlantic Monthly," for the months of November, 1859, and December, 1859, by the said firm of Ticknor & Fields at the said city of Boston prior to Nov. 23, 1859.

And your orators further say that each of said twelve numbers of the "Atlantic Monthly" was a volume bound in a paper cover of about one hundred and twenty-eight printed pages, and consisted of the part of the said work entitled "The Professor at the Breakfast Table," therein published as aforesaid, and other literary compositions.

And your orators further say, upon information and belief, that prior to the twenty-eighth day of September, 1859, said firm of Phillips, Sampson & Company did, at said city of Boston, publish in print said ten numbers of the "Atlantic Monthly" for January, 1859, and each successive month thereafter, down to and including the month of October, 1859, and did, prior to Sept. 28, 1859, sell to the public, at said city of Boston, thousands of printed copies of each of said numbers of the "Atlantic Monthly."

And your orators further say, upon information and belief, that prior to the twenty-third day of November, 1859, the said firm of Ticknor & Fields did, at the said city of Boston, publish in print said numbers of the "Atlantic Monthly" for the months of November, 1859, and December, 1859, and did, prior to Dec. 10, 1859, sell to the public, at said city of Boston, thousands of printed copies of each of said two numbers of the "Atlantic Monthly."

And your orators further say, upon information and belief, that said ten parts of said work entitled "The Professor at the Breakfast Table," which were printed, published and sold as aforesaid by said firm of Phillips, Sampson & Company in said ten numbers of the "Atlantic Monthly" for January, 1859, and each successive month thereafter, down to and including the month of October, 1859, were so printed, published and sold by Phillips, Sampson & Company by and with the consent and authority of said Oliver Wendell Holmes, and under and in accordance with an agreement made by and between said Oliver Wendell Holmes and said firm of Phillips, Sampson & Company, whereby, for a valuable consideration, the said Oliver Wendell Holmes granted to said firm of Phillips, Sampson & Company the right and privilege to print, publish and sell said twelve parts of said work entitled "The Professor at the Breakfast Table" in the twelve numbers of the "Atlantic Monthly" for the month of January, 1859, and each successive month thereafter, down to and including the month of December, 1859.

And your orators further say, upon information and belief, that after the publication as aforesaid of the number of the "Atlantic Monthly" for October, 1859, and prior to the publication as aforesaid of the number of the "Atlantic Monthly" for the month of November, 1859, the duly appointed assignees in insolvency of said firm of Phillips, Sampson & Company, said firm having failed in business, sold and assigned all the interest of Phillips, Sampson & Company in the said "Atlantic Monthly" and in their said agreement with Oliver Wendell Holmes to the firm of Ticknor & Fields, who were at that time engaged in the publishing business

in the city of Boston; and that said Oliver Wendell Holmes knew of and assented to said sale and assignment to said Ticknor & Fields of the "Atlantic Monthly," and of the right of Phillips, Sampson & Company to publish "The Professor at the Breakfast Table" therein; and that said firm of Ticknor & Fields for several years immediately subsequent to said sale and assignment was the proprietor and
6 publisher of said "Atlantic Monthly" and published the same in said city of Boston.

And your orators further say, on information and belief, that said two parts of said work entitled "The Professor at the Breakfast Table," which were printed, published and sold as aforesaid by said firm of Ticknor & Fields in said two numbers of the "Atlantic Monthly" for the months of November, 1859, and December, 1859, were so printed, published and sold by said firm of Ticknor & Fields by and with the consent and authority of said Oliver Wendell Holmes, and under and in accordance with the said agreement between Oliver Wendell Holmes and Phillips, Sampson & Company, theretofore assigned to said Ticknor & Fields as aforesaid.

And your orators further say, upon information and belief, that for the purpose of securing a copyright in said number of the "Atlantic Monthly" for the month of December, 1859, said firm of Ticknor & Fields did, on the seventeenth day of November, 1859, and prior to the publication of said number of the "Atlantic Monthly" for December, 1859, deposit in the name of Ticknor & Fields a printed copy of the title of said number of the "Atlantic Monthly" for December, 1859, to wit, "Number 26 the Atlantic Monthly, devoted to literature, art and politics, December, 1859," in the clerk's office of the district court of Massachusetts, being the district in which said Oliver Wendell Holmes, as also the partners in said firm of Ticknor & Fields, at the time resided; and that the clerk of said court did record the said title in the words of the statute then in the premises obtaining; and the said Ticknor & Fields did also, on the said seventeenth day of November, 1859, cause to be delivered to the said clerk of said district court a copy of the number of the "Atlantic Monthly" for December, 1859.

And your orators further say, on information and belief, that the said publishing house of Ticknor & Fields inserted in the several copies of every edition published of the entire number of the "Atlantic Monthly" for December, 1859, on the page immediately following the title page, the following words: "Entered according to act of Congress in the year 1859, by Ticknor & Fields, in the clerk's office of the district court of the district of Massa-
7 chusetts;" but no notice of copyright was given in any copy of any edition of "The Professor at the Breakfast Table," published in separate book form, except as hereinafter stated.

And your orators further say, upon information and belief, that after the publication as aforesaid of all the parts of said work entitled "The Professor at the Breakfast Table," in the said numbers of the "Atlantic Monthly," and on the twenty-first day of December, 1859, the said Oliver Wendell Holmes did, by Ticknor & Fields as his agents, deposit a printed copy of the title of said work entitled "The

Professor at the Breakfast Table" in the clerk's office of the district court for the district of Massachusetts, that being the district wherein said author then resided; and that the clerk of said court forthwith recorded said title, to wit, "The Professor at the Breakfast Table," in a book kept for that purpose; and the said Oliver Wendell Holmes did also, on the twenty-first day of December, 1859, cause a copy of said work, in separate book form, entitled "The Professor at the Breakfast Table," to be to the said clerk delivered.

And your orators further show, upon information and belief, that on the twenty-second day of December, 1859, said firm of Ticknor & Fields published in print the whole of said work entitled "The Professor at the Breakfast Table," at the said city of Boston, in separate book form, that is to say, not as a part of the "Atlantic Monthly," or of any number or numbers thereof, but as a separate and distinct volume, containing no other literary matter and bearing the title "The Professor at the Breakfast Table," and no other title; and that during many years immediately subsequent to Dec. 22, 1859, said firm of Ticknor & Fields did publish in print many editions of the whole of said work entitled "The Professor at the Breakfast Table" in said separate book form in said city of Boston, and that said firm of Ticknor & Fields so published said work in separate book form with the license and consent of said Oliver Wendell Holmes, and under and in accordance with an agreement theretofore made by and between said Oliver Wendell Holmes and said Ticknor & Fields, whereby, for a valuable consideration, said Oliver Wendell Holmes agreed to grant to said firm of Ticknor & Fields a right to so publish said work in separate book form as aforesaid.

8 And your orators further say, upon information and belief, that said Oliver Wendell Holmes and said firm of Tickner & Fields inserted in the several copies of every edition of said work entitled "The Professor at the Breakfast Table," published in separate book form as aforesaid, on the page immediately following the title page, the following words, to wit: "Entered according to act of Congress in the year 1859, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts;" except that in additions published after June, 1874, the notice was as follows, to wit: "Copyright 1859 by Oliver Wendell Holmes." No other notice of copyright was given in any copy of any edition of said work entitled "The Professor at the Breakfast Table," published in separate book form as aforesaid, at any time prior to June 30, 1887, nor in any copy of any addition of said work published by said Oliver Wendell Holmes, or by said Ticknor & Fields, or by any other person, between Dec. 21, 1859, and June 30, 1887.

And your orators further say that on the thirtieth day of June, 1887, said Oliver Wendell Holmes recorded the title of "The Professor at the Breakfast Table" a second time, and deposited in the mail, addressed to the Librarian of Congress, at Washington, D. C., a printed copy of the title of said book, and the said librarian did forthwith record the title of said book, to wit: "The Professor at the Breakfast Table," in a book kept for that purpose; and that said Oliver Wendell Holmes did also cause a copy of the record last

aforesaid to be published in the *Publishers' Weekly*, a weekly newspaper published in the city of New York, in the issues of said paper for July 23, Aug. 6, Aug. 13 and Aug. 20, 1887, and did also, on Aug. 6, 1887, deposit two copies of said work entitled "The Professor at the Breakfast Table" with the Librarian of Congress; and said Oliver Wendell Holmes caused to be inserted in the several copies of each and every edition thereafter published of said work entitled "The Professor at the Breakfast Table," on the page immediately following the title page, a notice as follows: "Copyright 1887 by Oliver Wendell Holmes," and also the following words, to wit: "Copyright 1859 by Oliver Wendell Holmes."

And your orators further say that on the twenty-first day of February, 1895, Oliver Wendell Holmes, Jr., the sole executor of
9 the will of the said Oliver Wendell Holmes, the author, executed and delivered to your orators an assignment in writing, under his hand and seal, of which a copy is hereto annexed and marked "Exhibit A" hereof.

And your orators further say, that since the first day of October, 1899, without the consent and against the will of your orators, the defendant has sold, and continues to sell, copies of the whole of the aforesaid work entitled "The Professor at the Breakfast Table," all of which copies were copied by the defendant from said twelve numbers of the "Atlantic Monthly," and were exact copies, word for word, of said twelve parts of "The Professor at the Breakfast Table," which were printed and published in the aforesaid numbers of the "Atlantic Monthly," and none of said copies contained any other or additional matter whatsoever; and that upon each and every copy of said book so sold or disposed of by the defendant, a notice appeared on the title page stating that the same was "reprinted from the original text as published in the Atlantic Monthly."

In consideration whereof, and because your orators cannot have adequate relief except in a court of equity, and to the end that the said R. H. White Company may answer all and singular the matters and things hereinbefore set forth and complained of, and that the said R. H. White Company be restrained by injunction, as well perpetually as during the pendency of this suit, from selling, and from exposing for sale copies of the said piratical and unlawful book; and that said R. H. White Company may be required to account to your orators for all such books so sold by it, and to pay over to your orators the profits which it has made, and the damages which it has caused to your orators by its said wrongful acts; and that your orators may have such further relief in the premises as may seem equitable, and as the nature of the case may require:

May it please your honors to grant not only writs of injunction conformable to the prayer of this bill, but also a writ of subpœna directed to the said R. H. White Company commanding it to be and appear before this honorable court, then and there to answer the premises and to do and receive what to your honors may seem meet in the premises.

HOUGHTON, MIFFLIN & CO.,
By JAMES MURRAY KAY.

10 UNITED STATES OF AMERICA, } ss:
District of Massachusetts, County of Suffolk, }

On this twenty-sixth day of February, 1900, personally appeared James Murray Kay and made oath that he is one of the complainants herein, that he has read the foregoing bill of complaint and knows the contents thereof, and the same is true to the best of his knowledge and belief.

Before me,
[SEAL.] EDMUND A. WHITMAN,
Notary Public.

EXHIBIT A.

For and in consideration of one dollar to me in hand paid by Houghton, Mifflin & Company, of Boston, in the Commonwealth of Massachusetts, and for other good and lawful considerations, the receipt whereof is hereby acknowledged, I, Oliver Wendell Holmes, executor of the late Oliver Wendell Holmes of said Boston, hereby assign to said Houghton, Mifflin & Company all my right, title and interest in and to the copyright of the following-named works written by the late Oliver Wendell Holmes, in and for the United States of America, to wit: The Autocrat of the Breakfast Table; The Professor at the Breakfast Table; The Poet at the Breakfast Table; Over the Teacups; Elsie Venner, a Romance of Destiny; The Guardian Angel; A Moral Antipathy; Pages from an Old Volume of Life; Medical Essays; One Hundred Days in Europe; Poems, three volumes; John Lothrop Motley; A Memoir; Ralph Waldo Emerson; and of all other writings of said Oliver Wendell Holmes published and copyrighted in the United States in his lifetime. To have and to hold for the benefit of said Houghton, Mifflin & Company, their legal representatives and assigns, for the whole duration of the copyright of said works and any renewals thereof.

Witness my hand and seal this twenty-first day of February, A. D. eighteen hundred and ninety-five.

OLIVER WENDELL HOLMES. [SEAL.]

Witnesses:
RICHARD J. MURRAY.
JAMES L. EDWARDS.

11 The within assignment of copyright is this day recorded in the office of the Librarian of Congress, in conformity with the laws of the United States respecting copyrights.

Witness my hand and the seal of my office, this first day of March, A. D. 1895.

[SEAL.] A. R. SPOFFORD,
Librarian of Congress.

At the same term the following demurrer was filed:

Demurrer.

(Filed by consent March 30, 1900.)

The demurrer of R. H. White Company, the above-named defendant, to the bill of complaint of the above-named complainants.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer shows that the complainants have not by their said bill made or stated such a case as entitles them or any of them in a court of equity to any relief against this defendant as to the matters contained in the said bill or any of such matters.

And for a further and more specific ground of demurrer to the said bill of complaint, this defendant shows that it affirmatively appears by the said bill of complaint that the work entitled "The Professor at the Breakfast Table" was published with the consent and under the authority of Oliver Wendell Holmes before he deposited a printed copy of the title thereof in the clerk's office of the district court for the district of Massachusetts; that the portion of "The Professor at the Breakfast Table" which was published in and as part of the December 1859 number of the "Atlantic Monthly" was on Dec. 22, 1859, and afterwards, published by Ticknor & Fields in and as part of a book entitled "The Professor at the Breakfast Table," and bearing no other title, the same being a totally different title from that under which said number of the "Atlantic Monthly" had been previously entered for copyright, to wit, "Number 26 Atlantic Monthly;" that no notice of the
12 copyright entered by Ticknor & Fields in the December 1859 number of the "Atlantic Monthly" was inserted in any of the copies of "The Professor at the Breakfast Table" published by Ticknor & Fields in separate book form, and that by reason of the omission of the name of Ticknor & Fields in the notice of copyright inserted in said copies, the requirements of the statute were not complied with in respect to notice of the copyright alleged to have been entered by Ticknor & Fields in "Number 26 Atlantic Monthly;" and that the copyright alleged to have been entered in the December 1859 number of the "Atlantic Monthly" expired in 1887, and it does not appear from said bill that the same was renewed or extended.

This defendant, further demurring to so much and such parts of the said bill of complaint as refer to the copyright therein alleged to have been entered in the book entitled "The Professor at the Breakfast Table," for cause of demurrer shows that it affirmatively appears by said bill of complaint that said work was published with the consent and under the authority of Oliver Wendell Holmes before he deposited a printed copy of the title thereof in the clerk's office of the district court for the district of Massachusetts.

This defendant, further demurring to so much and such parts of the said bill of complaint as refer to the copyright therein alleged to have been entered in the book entitled "Number 26 Atlantic Monthly, devoted to literature, art and politics, December, 1859," for causes of demurrer shows:

First. That the portion of "The Professor at the Breakfast Table" which was published in and as part of the December 1859 number of the "Atlantic Monthly" was on Dec. 22, 1859, and afterwards, published by Ticknor & Fields in and as part of a book entitled "The Professor at the Breakfast Table," and bearing no other title, the same being a totally different title from that under which said number of the "Atlantic Monthly" had been previously entered for copyright, to wit, "Number 26 Atlantic Monthly."

Second. That no notice of the copyright entered by Ticknor & Fields in the December 1859 number of the "Atlantic Monthly" was inserted in any of the copies of "The Professor at the Breakfast Table," published by Ticknor & Fields in separate book form, and that by reason of the omission of the name of Ticknor &
13 Fields in the notice of copyright inserted in said copies the requirements of the statute were not complied with in respect to notice of the copyright alleged to have been entered by Ticknor & Fields in "Number 26 Atlantic Monthly."

Third. That the copyright alleged to have been entered by Ticknor & Fields in the December 1859 number of the "Atlantic Monthly" expired in 1887, and it does not appear from said bill that the same was renewed or extended.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto and it prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

RALPH W. FOSTER,
Solicitor and of Counsel for Defendant,
53 *State Street, Boston.*

I hereby certify that I am of counsel for the defendant in the above-entitled cause, and that in my opinion the foregoing demurrer is well founded in law, and proper to be filed in the above cause.

RALPH W. FOSTER,
Of Counsel for Defendant.

Boston, March 24, 1900.

STATE OF MASSACHUSETTS, }
County of Suffolk, } *ss:*

George W. Crosby, being duly sworn, says that he is the treasurer of The R. H. White Company, the defendant in the above-entitled suit; that the foregoing demurrer is not interposed for the purpose of delay; and that the reason why this oath is not made by the R. H. White Company is that said company is a corporation.

GEORGE W. CROSBY.

Subscribed and sworn to before me this twenty-eighth day of March, 1900.

[SEAL.] RALPH W. FOSTER,
Notary Public.

14 This cause was thereupon, to wit, May 1, 1900, set down for hearing and was heard in part by the court, on demurrer, the Honorable Le Baron B. Colt, circuit judge, sitting.

This cause was thence continued to the May term, A. D. 1900, when on the sixth day of June, A. D. 1900, the hearing on the demurrer was concluded, the Honorable Le Baron B. Colt, circuit judge, sitting as aforesaid.

This cause was thence continued to the present October term, A. D. 1900, when the opinion of the court is announced and the following final decree is entered:—

Final Decree, March 29, 1901.

COLT, *J.:*

This cause came on to be heard at this term and was argued by counsel for the respective parties, and thereupon, it is ordered, adjudged and decreed that the demurrer to the amended bill of complaint herein be and the same is hereby sustained, and that the said amended bill of complaint be and the same is hereby dismissed with costs to the defendant to be taxed at fifty-one dollars and seventy-six cents ($51.76).

By the court,

BENJ. H. BRADLEE,
Deputy Clerk.

From the final decree the complainants claim an appeal to the United States circuit court of appeals for the first circuit, and give good and sufficient security that they will prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, and said appeal is allowed accordingly.

A true record:
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

15 Circuit Court of the United States, District of Massachusetts.
In Equity.

GEORGE H. MIFFLIN ET AL.
v.
BENJAMIN F. DUTTON ET AL. } No. 1290.

GEORGE H. MIFFLIN ET AL.
v.
R. H. WHITE COMPANY. } No. 1232.

Opinion of the Circuit Court, March 18, 1901.

COLT, *J.:*

In *Holmes v. Hurst*, the supreme court held that the serial publication of "The Autocrat of the Breakfast Table" in the *Atlantic*

Monthly, a periodical magazine, vitiated a copyright of the whole book subsequently obtained by its author, Oliver Wendell Holmes. In the construction of sections 1 and 4 of the act of February 3, 1831, c. 16, the court observed: "The substance of these enactments is that, by section one, the author is only entitled to a copyright of books not printed and published; and by section four, that, as a preliminary to the recording of a copyright, he must, before publi-
cation, deposit a printed copy of the title of such book." 4
16 Stat. 436. In the course of its opinion, the court said: "We have not overlooked the inconvenience which our conclusions will cause, if, in order to protect their articles from piracy, authors are compelled to copyright each chapter or instalment as it may appear in a periodical; nor the danger and annoyance it may occasion to the Librarian of Congress, with whom copyrighted articles are deposited, if he is compelled to receive such articles as they are published in newspapers and magazines; but these are evils which can be easily remedied by an amendment of the law." 174 U. S. 82, 87, 90.

In the two cases at bar it appears from the allegations of the bills that, before any copyright was taken out, the first twenty-nine of the forty-two chapters of "The Minister's Wooing," by Harriet Beecher Stowe, were published in the serial numbers of the *Atlantic Monthly*, beginning with December, 1858, and ending with October, 1859; and that ten of the twelve parts of "The Professor at the Breakfast Table," by Oliver Wendell Holmes, were published in the serial numbers of the same magazine, beginning January, 1859, and ending with October, 1859.

In October, 1859, Mrs. Stowe took out a copyright in "The Minister's Wooing" as a whole, before its publication. The notice of copyright inserted in the book was as follows: "Entered according to act of Congress in the year 1859, by Harriet Beecher Stowe, in the clerk's office of the district court of the district of Massachusetts." After the publication of the book, the remaining thirteen chapters of "The Minister's Wooing" were published in the November and December numbers of the *Atlantic Monthly* for the year 1859. The publishers took out a copyright in these numbers of the magazine. The notice of copyright on the page following the title page was as follows: "Entered according to act of Congress, in the year 1859, by Ticknor & Fields, in the clerk's office of the district court of the district of Massachusetts."

By section five of the act of February 3, 1831, 4 Stat. 436, it is provided: "That no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured,
17 by causing to be inserted, in the several copies of each and every edition published during the term secured on the title page, or the page immediately following, if it be a book, * * * the following words, viz: 'Entered according to act of Congress, in the year ——, by A. B., in the clerk's office of the district court of ——.'"

Upon the authority of *Holmes v. Hurst*, *supra*, the first twenty-nine

chapters of "The Minister's Wooing" became public property; and we have only to consider whether a valid copyright exists in the remaining thirteen chapters. It is true that Mrs. Stowe, by taking out a copyright in her whole work in October, 1859, secured a valid copyright in these thirteen chapters. The question is, has she not vitiated this copyright by failing to insert the proper notice of her copyright in the November and December numbers of the *Atlantic Monthly*, in which this portion of her work was also published? The magazine contained a notice that it was copyrighted by Ticknor & Fields; and it is maintained that this is not a compliance with the notice required by section five of the act of February 3, 1831.

The law seems to be settled that the name of the party taking out the copyright must be inserted in the notice of every edition published; and that the failure to do this vitiates the copyright. A literal compliance with the statute may not be required, but the notice must contain the essentials of the name, claim of exclusive right, and the date when obtained. Under the authorities, I must hold that the insertion of the name "Ticknor & Fields" in the copyright notice in the *Atlantic Monthly* for the months of November and December, 1859, was an insufficient notice of Mrs. Stowe's copyright, and invalidates her right to any copyright in that portion of her book. The contention of the complainants that Ticknor & Fields were the agents for Mrs. Stowe, and that the insertion in the notice of the name of an agent sufficiently satisfies the requirements of the statute, is clearly unsound. *Thompson v. Hubbard*, 131
18 U. S. 123, 149, 150; *Lithographic Co. v. Sarony*, 111 U. S. 53, 55; *Osgood v. Aloe Instrument Co.*, 83 Fed. Rep. 470; S. C., 69 Fed. Red. 291; *Hoertel v. Tuch*, 94 Fed. Rep. 844; *Higgins v. Keuffel*, 30 Fed. Rep. 627; S. C., 140 U. S. 428; *Jackson v. Walkie*, 29 Fed. Rep. 15.

In "The Professor at the Breakfast Table" the facts alleged in the bill are somewhat different, although the case is governed by the same principle. The last two parts of this work were published in the December number of the *Atlantic Monthly* for 1859, and a copyright was taken out by Ticknor & Fields in that number. In the latter part of that month, Dr. Holmes entered his entire work for copyright, and subsequently published it, inserting the following notice in his book: "Entered according to act of Congress in the year 1859, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts." A previous copyright having been obtained in the name of the publishers, Ticknor & Fields, the subsequent notice of copyright by Dr. Holmes in his book must be held insufficient under the cases above cited.

The demurrers to the bills are sustained, and the bills are to be dismissed.

Petition for Appeal and Assignment of Errors.

(Filed May 10, 1901.)

Petition for appeal.

The above-named complainants, considering themselves aggrieved by the final decree in the above-entitled cause sustaining the demurrer and dismissing the amended bill, hereby petition for an appeal from said decree to the United States circuit court of appeals for the first circuit, that a transcript of the record and a copy of the opinion of the court, filed in said cause, may be transmitted to the circuit court of appeals for the first circuit, and that a citation, in due form, be issued to the said R. H. White Company, citing and admonishing it to be and appear in the United States circuit court of appeals for the first circuit, pursuant to their appeal.

By their solicitors, ELDER, WAIT & WHITMAN.

19 *Assignment of Errors.*

Now come the complainants in the above-entitled cause, and file with their above petition for appeal this, their assignment of errors. The court erred,

1. In sustaining the demurrer to the amended bill of complaint.
2. In dismissing the amended bill of complaint.
3. In holding that the notice of copyright by Dr. Holmes in his work, "The Professor at the Breakfast Table," as issued by him in book form, was insufficient, and that his copyright was thereby lost.

By their solicitors, ELDER, WAIT & WHITMAN.

Bond to Party on Appeal.

(Filed and approved May 10, 1901.)

Know all men by these presents, that we, George H. Mifflin, of Boston, James Murray Kay, of Brookline, Henry O. Houghton, of Cambridge, Massachusetts, Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, all of New York city, as principals, and Francis Jackson Garrison, Henry Nathan Wheeler, as sureties, are held and firmly bound unto R. H. White Company, a corporation having a usual place of business in Boston, Massachusetts, in the full and just sum of one thousand dollars, to be paid to the said R. H. White Company, its certain attorney, executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighteenth day of April in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a circuit court of the United States for the district of Massachusetts, in a suit in equity depending in said court between the said George H. Mifflin, James Murray Kay, Henry O.

Houghton, Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, complainants, and the said R. H. White Company, respondent, a decree was entered against the said complainants, and the said complainants having obtained an appeal to remove said cause to the United States circuit court of appeals for the first circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said respondent citing and admonishing it to be and appear in the said United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the seventh day of June, A. D. 1901.

20 Now, the condition of the above obligation is such, that if the said complainants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE H. MIFFLIN. [SEAL.]
JAS. MURRAY KAY. [SEAL.]
HENRY O. HOUGHTON. [SEAL.]
LUCY H. VALENTINE. [SEAL.]
OSCAR R. HOUGHTON. [SEAL.]
ALBERT F. HOUGHTON, [SEAL.]
By JAS. MURRAY KAY.
FRANCIS JACKSON GARRISON. [SEAL.]
HENRY NATHAN WHEELER. [SEAL.]

Sealed and delivered in presence of
McDONALD ELLIS WHITE.

Approved:
LE BARON B. COLT,
Circuit Judge.

Notice of examination of sureties is hereby waived and I hereby assent to the allowance of the bond.

RALPH W. FOSTER,
Defendants' Solicitor.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to R. H. White Company, a corporation duly established according to law, and having its usual place of business in Boston, in the State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the seventh day of June next, pursuant to an appeal duly obtained from a decree of the circuit court of the United States for the district of Massachusetts, wherein George H. Mifflin, of Boston, James Murray Kay, of Brookline,

Henry O. Houghton, individually and as trustee with Alberta M. Houghton, both of said Cambridge, under the will of Henry O. Houghton, deceased, all within the district of Massachusetts, Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, all of New York, in the State of New York, and all citizens of the United States, copartners under the firm name of Houghton, Mifflin & Company, and having a usual place of business in Boston, in said district of Massachusetts, are appellants, and you are appel-
21 lees, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, judge of the circuit court of the United States for the district of Massachusetts, this tenth day of May, in the year of our Lord one thousand nine hundred and one.

LE BARON B. COLT,
U. S. Circuit Judge.

Acknowledgment of Service on Citation on Appeal.

BOSTON, MASS., *May* 20, 1901.

Service of the within citation is hereby accepted.

RALPH W. FOSTER,
Defendants' Solicitor.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, Benjamin H. Bradlee, deputy clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled,

GEORGE H. MIFFLIN ET AL., Complainants,
v.
R. H. WHITE COMPANY, Defendants,
} No. 1232,

in said circuit court determined, the opinion of the circuit court of March 18, 1901, the petition for appeal and assignment of errors, the bond to party on appeal, and also the original citation issued upon the appeal of the complainants in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-ninth day of May, A. D. 1901.

[SEAL.]

BENJAMIN H. BRADLEE,
Deputy Clerk.

22 *Motion to Amend Amended Bill of Complaint.*

(Filed in circuit court of appeals June 6, 1901, and allowed.)

It is moved that the bill may be amended, pursuant to the annexed agreement, by adding thereto the following:

The matter in controversy in this case exceeds in value $1000 besides costs.

ELDER, WAIT & WHITMAN,
Plaintiffs' Attorneys.

Agreement for Amendment to Amended Bill of Complaint.

It is agreed that the bill may be amended by adding thereto the following:

The matter in controversy in this case exceeds in value $1000 besides costs.

ELDER, WAIT & WHITMAN,
Plaintiffs' Attorneys.
RALPH W. FOSTER,
Defendant's Attorney.

23 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
BENJAMIN F. DUTTON ET AL., Defendants, Appellees. } No. 387.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
R. H. WHITE COMPANY, Defendant, Appellee. } No. 388.

Appeals from the circuit court for the district of Massachusetts.

Before Putnam, Webb, and Aldrich, JJ.

Opinion of the Circuit Court of Appeals, January 16, 1902.

PUTNAM, *J.:*

The first of these appeals originated in a bill to protect an alleged copyright in a portion of "The Minister's Wooing," and the second in a portion of "The Professor at the Breakfast Table." In each there was a demurrer, a decree dismissing the bill with costs, and an appeal. The alleged copyrights were taken under the act
24 of February 3, 1831, c. 16, 4 Stat. 436, and each claims the benefit of a renewal. Some questions are made about the renewals, but we need not consider them.

Twenty-nine of the forty-two chapters of "The Minister's Wooing" were published in the serial numbers of the Atlantic Monthly, beginning with December, 1858, and ending with October, 1859. In

October, 1859, Mrs. Stowe took out a copyright of "The Minister's Wooing" as a whole, and in the book published by her authority a proper notice of this copyright is entered. Subsequent to taking out this copyright, the remaining thirteen chapters were published in the November and December numbers of the Atlantic Monthly for the same year. On the page following the title page of these numbers was printed the following: "Entered according to act of Congress, in the year 1859, by Ticknor & Fields, in the clerk's office of the district court of the district of Massachusetts." All the magazine publications were with the consent of Mrs. Stowe, under a formal contract between her and the publishers.

The bill does not state whether or not Ticknor & Fields took out a copyright of any kind. The circuit court found that the publication of the first twenty-nine chapters without any copyright abandoned them to the public, in which it was undoubtedly correct. It, also, found in substance that, as the remaining thirteen chapters were published with no notice of the copyright except that which we have stated, this, although giving information that somebody had copyrighted something, was not a sufficient notice of a copyright by Mrs. Stowe, even in view of the liberal rulings as to the permissible form of a notice found in *Burrow-Giles Lithographic Company v. Sarony*, 111 U. S. 53, 55, 56, and in other cases of like class. We agree with this proposition; but the case goes farther. The notice given by the publishers of the Atlantic Monthly was clearly a notice of a supposed copyright secured by themselves, and it contained nothing to indicate that it was a notice of one taken by Mrs. Stowe. The presumption, therefore, is that it was a notice of a copyright of so much of the Atlantic Monthly as the publishers were entitled to copyright in their own behalf. They could not then copyright "The Minister's Wooing," because it had already been copyrighted, and there cannot be two successive copyrights of the same publication. To permit this would render possible an extension of the statutory period through which a copyright runs, which, of course, the law will not allow. Therefore, on the whole, the just conclusion is that Ticknor & Fields published the November and December numbers of the Atlantic Monthly, not only without any notice of Mrs. Stowe's copyright which was sufficient in law, but only with one which was presumably a notice of a copyright of their own.

With reference to "The Professor at the Breakfast Table," as the learned judge of the circuit court well said, the sequence of the facts is different, but the case is governed by the same principles. Ten of the twelve parts of this work were published in the serial numbers of the Atlantic Monthly, beginning in January, 1859, and ending in October, 1859, without any notice of any copyright. The remaining two parts were published in the following December number, as to which the bill states that a copyright was obtained by Ticknor & Fields, and a notice thereof given on the page following the title page, in the precise form which we have already stated in regard to "The Minister's Wooing." Afterwards, Dr. Holmes published the entire work in one volume, containing the following

notice: "Entered according to act of Congress in the year 1859, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts." In this case, there is an allegation that Dr. Holmes took out a copyright in his own behalf; so that the same observations apply even more positively to the notice given by him which we made with reference to that printed by Ticknor & Fields with regard to "The Minister's Wooing;" that is to say, it was a notice of a copyright taken out by him, and not of that taken out by Ticknor & Fields. While, therefore, as already said, we agree with the line of reasoning of the learned judge of the circuit
26 court, we may add the same conclusion as with reference to the other case, that, in the volume published by Dr. Holmes, no notice was given, or intended to be given, of the copyright taken out by Ticknor & Fields.

We ought to observe that the publication by Ticknor & Fields was with the authorization of Dr. Holmes, under a contract with him; so that he is chargeable with what was done by them. We ought, also, to add that, while it is possible that, in some aspects of the law, Ticknor & Fields might have obtained a copyright in behalf of themselves and of Dr. Holmes which would have protected the interests of both, and that, thus, Ticknor & Fields might have become a trustee of a copyright in behalf of both, yet there is no allegation in the bill to that effect. Therefore, inasmuch as the copyright taken out by Dr. Holmes was insufficient to protect any part of his volume, because the whole had received prior publication, and, as we have said, there cannot be successive copyrights, and inasmuch, also, as he published the only parts which could be regarded as protected by the prior copyright without giving notice thereof, it necessarily follows that the conclusion of the circuit court that the whole work was, in the end, abandoned to the public, was correct.

In No. 387, *Mifflin v. Dutton, the decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellees.*

In No. 388, *Mifflin v. R. H. White Company, the decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellees.*

27 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

GEORGE H. MIFFLIN, ET AL., Complainant-, Appellant-,
v.
R. H. WHITE COMPANY, Defendant, Appellee. } No. 388.

Final Decree in Circuit Court of Appeals, January 16, 1902.

This cause came on to be heard October 16, 1901, upon the transcript of the record of the circuit court of the United States for the district of Massachusetts, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed as follows: The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellee.

By the court,

JOHN G. STETSON, *Clerk.*

28 United States Circuit Court of Appeals for the First Circuit.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants, } No. 388.
v.
R. H. WHITE COMPANY, Defendants, Appellees.

Complainants' Appeal.

(Filed in circuit court of appeals February 13, 1902, and allowed.)

The above-named complainants, George H. Mifflin *et al.*, conceiving themselves aggrieved by the decree entered on January 16, 1902, in the above-entitled proceeding, do hereby appeal from said decree to the Supreme Court of the United States, and pray that this their appeal may be allowed, and that a transcript of the record proceedings and papers, upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ELDER, WAIT & WHITMAN,
Of Counsel for Complainants.

Boston, Mass, February 4, 1902.

Assignment of Errors.

And now come the complainants in the above-entitled cause and file with their above appeal, this their assignment of errors. The court erred:

1. In affirming the decree of the circuit court.

2. In holding that the notice of copyright by Dr. Holmes of "The Professor at the Breakfast Table," as issued by him in book form, was insufficient, and that her copyright was thereby lost.

By their solicitors, ELDER, WAIT & WHITMAN.

29 *Bond to Party on Appeal.*

Know all men by these presents, that we, George H. Mifflin of Boston, James Murray Kay of Brookline, Henry O. Houghton of Cambridge, Massachusetts, Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, of New York city, as principals, and Francis J. Garrison of Lexington and Henry N. Wheeler of Cambridge, as sureties, are held and firmly bound unto R. H. White Company, a corporation, having its usual place of business in Boston, in the full and just sum of one thousand dollars to be paid to the said R. H. White Company, its certain attorney, executors, administrators, its successors, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the twelfth day of February, in the year of our Lord one thousand nine hundred and two.

Whereas lately at a United States circuit court of appeals for the first circuit in a suit in equity depending in said court between George H. Mifflin *et al.*, complainants, appellants, and R. H. White Company defendant, appellee, decree was rendered against the said

appellants and the said appellants having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said R. H. White Company, appellee, citing and admonishing it to be and appear in the said Supreme Court of the United States at Washington within thirty days from the date hereof:

Now the condition of the above obligation is such, that if the said appellants shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

GEORGE H. MIFFLIN, [SEAL.]
By JAS. MURRAY KAY.
JAMES MURRAY KAY. [SEAL.]
HENRY O. HOUGHTON, [SEAL.]
By JAS. MURRAY KAY.
LUCY H. VALENTINE, [SEAL.]
By JAS. MURRAY KAY.
OSCAR R. HOUGHTON, [SEAL.]
By JAS. MURRAY KAY.
ALBERT F. HOUGHTON, [SEAL.]
By JAS. MURRAY KAY.
FRANCIS J. GARRISON. [SEAL.]
HENRY N. WHEELER. [SEAL.]

Signed, sealed and delivered in presence of
ROGER L. SCAIFE,
4 *Park St., Boston.*

Approved:
Feb. 13, 1902.
W. L. PUTNAM.

Notice of examination of sureties is hereby waived; and I assent to the allowance of this bond.

RALPH W. FOSTER,
Defendants' Solicitor.

30 United States Circuit Court of Appeals for the First Circuit.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
R. H. WHITE COMPANY, Defendant, Appellee.
No. 388.

Clerk's Certificate.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the foregoing transcript in the above-entitled cause, to which this certificate is annexed, contains and is a true copy of the record and all proceedings in said cause lately determined in said circuit court of appeals, the original record thereof remaining in my office, and that annexed hereto is the original citation issued upon the appeal of said complainants to the Supreme Court of the United States.

In testimony whereof, I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in said first circuit, this third day of March, A. D. 1902.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

31 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the R. H. White Company, a corporation duly established according to law and having its usual place of business in Boston, in the district of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to an appeal claimed and allowed by the United States circuit court of appeals for the first circuit in a cause wherein George H. Mifflin of Boston, James Murray Kay of Brookline, Henry O. Houghton, individually and as trustee with Alberta M. Houghton both of Cambridge, under the will of Henry O. Dutton, deceased, all within the State and district of Massachusetts, and Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton all of New York in the State of New York, copartners under the firm name of Houghton, Mifflin & Company are complainants and appellants and you are defendant and appellee, to show cause, if any there be, why the decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam U. S. circuit judge, this thirteenth day of February, in the year of our Lord one thousand nine hundred and two.

W. L. PUTNAM,

U. S. Circuit Judge and Judge of the United States Circuit Court of Appeals for the First Circuit, Presiding in the Above-named Cause.

BOSTON, MASS., *Feb.* 27, 1902.

Service of the within citation is hereby accepted.

RALPH W. FOSTER,

Solicitor for Defendant, Appellee.

Endorsed on cover: File No. 18,442. U. S. C. C. of appeals, 1st circuit. Term No. 268. George H. Mifflin, James Murray Kay, Henry O. Houghton, individually & as trustee with Alberta M. Houghton under the will of Henry O. Dutton, dec'd, *et al.*, copartners, &c., appellants, *vs.* The R. H. White Company. Filed March 7", 1902.